THE PROGRESS OF THE LAW, 1918–1919

EQUITY (*Continued*)

9. EQUITABLE SERVITUDES

SEVERAL cases decided during the past year involve incidentally the nature of restrictive agreements as to the use of property enforceable in equity.[1] In the classical decision on this subject,[2] Lord Cottenham considered that he was enforcing against C a contract made between A and B and that he was doing so in order to prevent unjust enrichment. Later English cases argued in the same way,[3] but it is now clear that English courts regard these agreements as imposing servitudes upon the property restricted, either appurtenant to other property, or for the benefit of a particular person while owner of such other property.[4] American courts have been coming to the same result,[5] although the language of the decisions is not always consistent in the same jurisdiction and some courts seem committed to the contractual view.[6] When the objection is raised that no pecuniary advantage

[1] White *v.* Harrison, 81 So. (Ala.) 565 (1919); Werner *v.* Graham, 183 Pac. (Cal.) 945 (1919); Windemere-Grand Improvement Ass'n *v.* American Bank, 172 N. W. (Mich.) 29 (1919); Swan *v.* Mitshkun, 173 N. W. (Mich.) 529 (1919); Bull *v.* Burton, 124 N. E. (N. Y.) 111 (1919).

[2] Tulk *v.* Moxhay, 2 Phil. 774 (1848).

[3] "The argument must, it would seem, go to this length, viz., that . . . a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant. . . . It appears to me that . . . this is not the law of this court and that in order to enable a purchaser as an assign . . . to claim the benefit of a restrictive covenant, this, at least, must appear, that the . . . benefit of the covenant was part of the subject-matter of the purchase." Hall, V. C., in Renals *v.* Cowlishaw, 9 Ch. D. 125, 130 (1878).

[4] Rogers *v.* Hosegood, [1900] 2 Ch. 388; *In re* Nisbet and Potts' Contract, [1905] 1 Ch. 391, 399, [1906] 1 Ch. 386, 401, 405, 409.

[5] Werner *v.* Graham, 183 Pac. (Cal.) 945 (1919); Childs *v.* Boston R. Co., 213 Mass. 91, 99 N. E. 957 (1912); Riverbank Improvement Co. *v.* Chadwick, 228 Mass. 242, 117 N. E. 244 (1917); King *v.* Union Trust Co., 226 Mo. 351, 126 S. W. 415 (1910); Flynn *v.* New York R. Co., 218 N. Y. 140, 112 N. E. 913 (1916).

[6] Wiegman *v.* Kusel, 270 Ill. 520, 110 N. E. 884 (1915); De Gray *v.* Monmouth Beach Co., 50 N. J. Eq. 329, 24 Atl. 388 (1892); Doan *v.* Cleveland R. Co., 92 Ohio St. 461, 112 N. E. 505 (1915); Bald Eagle R. Co. *v.* Nittany R. Co., 171 Pa. St. 284, 33 Atl. 239 (1895).

to plaintiff is involved in enforcement of the covenant, courts are apt to speak in terms of the property theory. When, on the other hand, the objection is that the character of the neighborhood or surroundings of the property and conditions of application of the servitude have changed, courts which in other connections adopt the property theory are likely to talk in terms of the contract theory.[7] This is brought out in the decisions during the past year. In *White* v. *Harrison* [8] and *Swan* v. *Mitshkun* [9] the defendants urged that on a balance of convenience and in view of the slight advantage or want of advantage to plaintiff, the chancellor in his discretion should deny an injunction. In granting injunctions the courts in effect took the position that they were protecting property, although the Alabama court speaks of preservation of a "plain contract right." [10] On the other hand, in *Windemere-Grand Improvement Ass'n* v. *American Bank* [11] and *Bull* v. *Burton*,[12] where the defense was change of condition of the neighborhood, the courts talk in terms of specific performance and of the discretion of the chancellor to refuse such relief on a balance of convenience where the result would be inequitable. The real difficulty is to find a suitable theory of the effect of change of situation upon equitable servitudes. This subject will be considered presently.

How much there may be in a name is shown by the cases on creation of equitable servitudes otherwise than by express covenant. Deduction from the phrase "covenants running with the land in equity" has manifestly played a large part in too many of them. What we really have here is an equitable appendix to the common law as to servitudes. The common law recognized ease-

[7] Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. 741 (1892); McClure *v.* Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905).

[8] 81 So. (Ala.) 565 (1919).

[9] 173 N. W. (Mich.) 529 (1919).

[10] 81 So. 566–567. It should be noted that this court turns Lord Cottenham's argument in Tulk *v.* Moxhay into a dogmatic fiction: "It [the court] was bound also to assume that the restriction of this covenant, and its effect upon property rights, had consideration when the deed from complainants' ancestor to defendant's predecessor in title was executed and remained a constant factor in subsequent transfers." Compare this with note 3, *supra*, where Hall, V. C., called for proof that the covenant had been taken into account in subsequent transfers.

[11] 172 N. W. (Mich.) 29 (1919).

[12] 124 N. E. (N. Y.) 111 (1919).

ments, profits *à prendre*, and covenants running with the land. To these equity has added a fourth category. In the classical case the equitable servitude was created by a covenant; but the decisive point was the declared intention of the parties, not the form in which it was declared. At law, profits and easements can be created only by deed or by adverse user, and in order that a covenant run with the land it must be a formal covenant. Equity, on the other hand, here as elsewhere, looks at the substance rather than the form, and the substance is declared intention. Hence, where there is a "building scheme" [13] and sales are made from a plat or plan showing restrictions, it has been held that such restrictions are "implied" in fact from the plan and the circumstances of the sales.[14] Two cases of the past year involve this subject. In *Farquharson* v. *Scoble* [15] the court came to the conclusion that while "some restrictive covenants . . . were contemplated" the exact scope thereof was not fixed and that no "general scheme or plan" was ever contemplated. In this respect the case is like *Herold* v. *Columbia Investment Co.*[16] which the court cites. Assuming such facts the result is sound enough. But the cause was disposed of on demurrer. It was alleged that the company which subdivided the tract in question and sold it in lots, "represented to all purchasers of lots that sales would be made in accordance therewith." This, it is said, is a mere statement of the alleged legal effect of filing the map. But is it not a question of fact how reasonable men in the position of the purchasers would understand the map and the sales therefrom? The crucial point would seem to be that the averments do not suffice to establish a representation that all sales to others would be made according to the same map.[17] The wisdom of abolishing the demurrer in equity is illus-

[13] See the useful classification in Korn *v.* Campbell, 192 N. Y. 490, 494–496, 85 N. E. 687 (1908).

[14] Spicer *v.* Martin, 14 A. C. 12 (1888); *In re* Birmingham and District Land Co., [1893] 1 Ch. 342; Simpson *v.* Mikkelsen, 196 Ill. 575, 63 N. E. 1036 (1902); Allen *v.* Detroit, 167 Mich. 464, 133 N. W. 317 (1911); Tallmadge *v.* East River Bank, 26 N. Y. 105 (1862); Bimson *v.* Bultman, 3 App. Div. 198, 38 N. Y. Supp. 209 (1896); Lowrance *v.* Woods, 54 Tex. Civ. App. 233, 118 S. W. 551 (1909).

[15] 27 Cal. App. 653, 177 Pac. 310 (1918).

[16] 72 N. J. Eq. 857, 67 Atl. 607 (1907).

[17] The court says: "The covenant here claimed cannot be implied from the mere making and filing of the map showing the different subdivisions, or by selling lots in conformity therewith."

trated when such questions are decided on the face of a pleading without taking evidence.

In *O'Malley* v. *Smith*,[18] when the land was subdivided for sale a plat was filed on which were dotted lines indicated to be twenty-five feet from the streets and expressly designated as building lines. There were no express covenants in the conveyances. The court was bound by prior decisions in Missouri [19] to hold that no equitable servitudes were imposed. *Zinn* v. *Sidler*, the leading case in that jurisdiction, involved a tract adjacent to Kansas City which had been laid out and sold in lots for residence purposes. On the plat were lines expressly marked "building lines" and both the original conveyances and all subsequent deeds referred to the plat. The court said:

"A *covenant* as to the restricted use of the property in question is necessary to sustain the plaintiffs' contention; the creation of such a covenant may be by *express words* or by reasonable *implication from words employed* clearly indicative of such a purpose." [20]

Also:

"It must be expressed in words, either definitely defining the covenant or making apt reference to the designated line, thus giving *formal* expression to the covenantor's purpose." [21]

In other words, the court calls for the form of a covenant, telling us that any implication must be drawn from the words used in the conveyance, not from the acts of the parties, and putting as an exception the statutory covenant for title involved in the words "grant, bargain and sell." [22] All this and the citation of "cyc" as to how restrictions are to be made to appear in deeds, shows the influence of the word "covenant" at the expense of equitable principles.[23]

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[18] 208 S. W. (Mo. App.) 849 (1919).

[19] Zinn *v.* Sidler, 268 Mo. 680, 187 S. W. 1172 (1916); Whittaker *v.* Lafayette Realty Co., 197 Mo. App. 377, 196 S. W. 109 (1917).

[20] Zinn *v.* Sidler, *supra*, 686–687. The italics are mine.

[21] *Id.*, 688. Italics mine.

[22] *Id.*, 689–690.

[23] The weight of authority is *contra;* Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275 (1889); Simpson *v.* Mikkelsen, 196 Ill. 575, 63 N. E. 1036 (1902); Rowan *v.* Portland, 8 B. Mon. (Ky.) 232 (1847); Freeman *v.* Island Heights Co., 75 N. J. Eq. 491, 77 N. J. Eq. 572, 72 Atl. 974, 78 Atl. 154 (1910); Schickhaus *v.* Sanford, 83 N. J. Eq. 544, 91 Atl. 878 (1914); Bridgewater *v.* Ocean City R. Co., 62 N. J. Eq. 276, 49 Atl. 801 (1901);

A related question arises as to the application of the Statute of Frauds to equitable servitudes upon land. If the ground of equitable relief is not enforcement of a contract by or against one who is not a party thereto in order to prevent unjust enrichment but protection of a servitude imposed upon the property, it would seem to follow that the Statute of Frauds precludes establishment of such a servitude solely by parol evidence. Courts have differed on this question, some using the term "equitable easements" and deducing therefrom that the statute is applicable,[24] others arguing that there is only a contract and hence that the statute does not apply since the agreement is not one for sale of an interest in lands.[25] Two cases on the subject were decided during the past year. In *Ham* v. *Massasoit Real Estate Co.*[26] the court took the view that the effect of the oral contract, if enforceable, would be to create an easement and that the transaction was within the statute. In *Jones* v. *Wyomissing Club* [27] the court passes only upon a question as to notice. Apparently no point was made as to the Statute of Frauds and the opinion does not refer thereto.

It is sound on principle and well settled that covenants creating equitable servitudes are to be construed against the dominant owner.[28] But this cannot mean that such a covenant is to be rigidly and literally construed at the expense of the purpose and intent of the parties. An interesting phase of this question arose in *Gnau* v. *Fitzpatrick*.[29] There the lots were sixty feet wide and the covenants were that there should be "but a single private dwelling with the necessary outbuildings erected on each lot" and that no dwelling should be "set nearer than ten feet to the west line of any lot." One defendant had acquired the east fifty feet of

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Lennig *v.* Ocean City Ass'n, 41 N. J. Eq. 606, 7 Atl. 491 (1886); Lowrance *v.* Woods, 54 Tex. Civ. App. 233, 118 S. W. 551 (1909). But see Light *v.* Goddard, 11 All. (Mass.) 5 (1865); McCloskey *v.* Kirk, 243 Pa. St. 319, 90 Atl. 73 (1914).

[24] Sprague *v.* Kimball, 213 Mass. 380, 100 N. E. 622 (1913); Tibbetts *v.* Tibbetts, 66 N. H. 360, 20 Atl. 979 (1890); Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.) 72 (1846); Pitkin *v.* Long Island R. Co., 2 Barb. Ch. (N. Y.) 221 (1847); Rice *v.* Roberts, 24 Wis. 461 (1869).

[25] Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876 (1892); Ware *v.* Langmade, 2 Ohio Dec. 116 (1894).

[26] 107 Atl. (R. I.) 205 (1919).

[27] 261 Pa. 190, 104 Atl. 551 (1918).

[28] Marsh *v.* Marsh, 106 Atl. (N. J.) 810 (1919), is a recent decision in point.

[29] 168 N. W. (Mich.) 1007 (1918).

lot 50, while the other now owned the west ten feet of lot 50 and the east forty feet of lot 51. One of the plaintiffs owned the west twenty feet of lot 51 and the whole of lot 52. Other plaintiffs were owners of other lots in the subdivision. It will be noted that while the covenants contemplated that the lots should be sixty feet wide and that there should be but one house on each sixty-foot lot, the defendants have each but fifty feet. Thus, consistently with a literal interpretation of the covenants, a house on either of the two parts of lot 51 would not violate them, so long as but one part was built upon. But in that event, which was it to be? The one first built upon? Or could neither owner of a part build without the consent of the other or some arrangement by which it could be determined who was to build the one house which alone could stand upon the two parcels? The trial judge, whose opinion is reported, took the first position, conceiving that any other view would give the owner of one portion of the divided lot a servitude in the other part. The majority of the Supreme Court, apparently assenting to this, considered also that the proposed buildings were consistent with a literal interpretation of the restrictions. The minority (three of seven judges) held that the purpose and intent of those who imposed the restrictions was that "not less than sixty feet should be occupied for each dwelling and its appurtenant structures" and left the question as to who should build as between two owners of parts of a subdivided lot unanswered. Were the owner of lot 52, who was also owner of part of the divided lot 51, the sole plaintiff, that question would require decision. But as other lot owners were also plaintiffs, the court was only called on to construe the restrictions with reference to the new situation. As between the owner of lot 52 and the defendants, the case is like *King* v. *Dickeson*.[30] It is submitted that such cases should turn upon the question whether the original transaction contemplated resubdivision and intended the building lines or other restrictions to apply as between the newly created parcels in the event thereof.[31] If resubdivision was not contemplated, those who take part therein must make new restrictions as between themselves with respect to the new parcels. If they do not, they are not bound as between themselves and it remains only that they do not violate the re-

[30] 40 Ch. D. 596 (1889).

[31] Compare Korn *v.* Campbell, 192 N. Y. 490, 85 N. E. 687 (1908).

strictions upon which owners of other parcels of the original tract may still insist. Hence as between the owner of lot 52 and the defendants, the position of the trial judge and of the majority of the Supreme Court would seem to be sound. If in building on the part of the original lot 51 which he now owns the defendant so building was not violating the original restrictions, ownership of another part of lot 51, which could not now be built upon as between the owner thereof and other lot owners, would give the owner of such other part of the original lot no ground of complaint. But other lot owners were also plaintiffs in the present case and they ought to be allowed to insist that the restrictions be adhered to according to their spirit and intent in order to carry out the purpose for which they were imposed.

In *Booth* v. *Knipe* [32] a restriction was imposed upon the use of a house. Counsel argued that the restriction was nugatory and should not be enforced in equity because the owner might tear the house down and there was no restriction upon any building that might be put up in its place. Cardozo, J., answered this contention with characteristic clarity and incisiveness, as follows:

"Owners of land know that buildings are put up to be used. They are not put up to be destroyed. To fix their character at the beginning may shape the future of the neighborhood. We do not refuse to enforce a covenant while it lasts because it may not last forever. Limitations are not illusory because they are not complete. The burden clings to the land till the building loses its identity." [33]

Three cases involve change of conditions and the effect thereof upon equitable servitudes. In *Swan* v. *Mitschkun* [34] there is the common situation in which lots restricted to residence purposes would now be more valuable if they could be used for business purposes. But the original purpose could be carried out and the court properly granted an injunction, using language that strongly suggests protection of a property right. In *Windemere-Grand Improvement Ass'n* v. *American State Bank* [35] the same court had before it a case in which radical and unforeseen changes had transformed a quiet suburban street into an exceptionally noisy thoroughfare,

[32] 225 N. Y. 390, 122 N. E. 202 (1919).
[33] 225 N. Y. 390, 395, 396, 122 N. E. 202, 203 (1919).
[34] 173 N. W. (Mich.) 529 (1919).
[35] 172 N. W. (Mich.) 29 (1919).

so that the original purpose could no longer be given effect. In properly denying an injunction the court, as is usual in such cases, speaks in terms of specific performance, saying:

"The right and duty of a chancery court to enforce restrictions under its equitable jurisdiction is not absolute. In the exercise of such jurisdiction the same general equitable considerations and rules are recognized as move the court in passing upon applications to compel specific performance of contracts." [36]

Bull v. *Burton* [37] involved the question whether a title was marketable where there were such restrictions but the situation had changed radically. A majority of the Court of Appeals (four judges, three dissenting) treated the question in the same way, saying that the decisions on this subject do not hold "that the restrictive covenants should be ignored," but "do hold that a court of equity should not do inequity, and that if the granting of an injunction to enforce restrictive covenants will result in inequity it will be denied." [38] Yet in other connections this same court has consistently taken the view that such restrictions create servitudes and give rise to proprietary rights. Courts have hesitated to admit the proprietary theory in the present connection because while a sound instinct leads them to feel that relief should be denied, an equally sound instinct leads them to feel that a court of equity should not have discretion to deprive a man of his property. Hence some courts have sought a way out by allowing or suggesting a recovery of damages after denial of the injunction,[39] while others

[36] 172 N. W. (Mich.) 32 (1919). But in another part of the opinion we are told that the restrictions had "become obsolete." It is noteworthy that however much courts strive to think and speak of equitable interests in terms of the personal theory, they continually lapse into the language and modes of thought of a real theory.

[37] 124 N. E. (N. Y.) 111 (1919).

[38] *Id.*, 115.

[39] Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); McClure *v.* Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905); Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. 741 (1892).

In Bull *v.* Burton the majority of the court argue that the title was not marketable because although no injunction would be granted to enforce the restrictions yet the purchaser with notice would be liable to an action for damages upon the covenant. The proposition that damages may be recovered in these cases is open to two decisive objections. If the damages are to be recovered at law, it must be because the burden of the restrictions runs with the land on conveyance of a fee simple. If the damages are to be awarded in equity it must be on the theory that the plaintiff has something subsisting and of value in the eyes of a court of equity which is taken from him and

have turned to the contract theory and treated these cases on lines of specific performance.[40] It is submitted that the sound course is to hold that when the purpose of the restrictions can no longer be carried out the servitude comes to an end; that the duration of the servitude is determined by its purpose. If imposed for a fixed time, it will last no longer, but it may not last so long if the purpose becomes unattainable in the meantime. When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination. There is then nothing left to protect by injunction and nothing for which to award damages.[41]

Analogous questions are raised by covenants not to compete with a business sold by covenantor to covenantee. In such cases as *Abergarw Brewery Co.* v. *Holmes*[42] similar covenants for the benefit of a business impose restrictions upon the use of property and may be said to create equitable servitudes in such property appurtenant to the business. But in cases like *Francisco* v. *Smith*[43] we cannot think in such terms. *Sickles* v. *Lauman*[44] is a recent case of the same type as *Francisco* v. *Smith*. Defendant had sold a business to plaintiff's assignor with a covenant not to compete with that business in the locality in question for five years. As in *Francisco* v. *Smith* the plaintiff, purchaser of the business from the covenantee, took an express assignment of the covenant. Also, as in *Francisco* v. *Smith*, the court considered that no express assignment was necessary; that the covenant could have no existence apart from the business it was intended to protect, and that whoever acquired that business was in equity entitled to enforce the

for which he is to be compensated. In that view the judicial award of damages amounts to condemnation of the servitude without legislative authority and for a private use. When the Massachusetts legislature sought to provide for such condemnations in the Land Court, the Supreme Court was compelled to hold the proceeding unconstitutional. Riverbank Improvement Co. *v.* Chadwick, 228 Mass. 243, 117 N. E. 244 (1917).

[40] In addition to the cases just cited see Sanford *v.* Keer, 80 N. J. Eq. 240, 83 Atl. 225 (1912); Orne *v.* Fridenberg, 143 Pa. St. 487, 22 Atl. 832 (1891).

[41] Knight *v.* Simmonds, [1896] 2 Ch. 294, 297; McArthur *v.* Hood Rubber Co., 220 Mass. 372, 109 N. E. 162 (1915); Riverbank Improvement Co. *v.* Chadwick, 228 Mass. 243, 117 N. E. 244 (1917). See fuller discussion of this matter in 31 HARV. L. REV. 876–879.

[42] [1900] 1 Ch. 188. Compare Wilkes *v.* Spooner, [1911] 2 K. B. 473, and the note in 24 HARV. L. REV. 574.

[43] 143 N. Y. 488, 38 N. E. 980 (1894). [44] 169 N. W. (Ia.) 670 (1918).

covenant.[45] In other words, the restriction was held to be appurtenant to the business. But if we think of it in this way, what is the servient property in such a case as *Francisco* v. *Smith* or *Sickles* v. *Lauman?* Certainly we cannot talk about a restriction on the covenantor's general substance — as the French would say, upon his patrimony. Servitudes exist only in specific things. Nor can we think of such restrictions as imposing a servitude upon the name considered as property. Obviously in such a case as *Sickles* v. *Lauman* covenantor would not be allowed to compete in the same locality under another name. What we really have here is an application of the doctrines of equity that the incident will pass with the principal thing without any formal assignment. Hence the right to enforce the personal promise made by the vendor for the benefit of and to protect the business and good will passes to the assignee of the business without requiring any assignment of the covenant. There is no more than a personal claim against covenantor, but that claim is an incident of the business and will pass therewith because its purpose and intent can only be carried out in that way and equity looks to that as the substance, and not to its form. It is significant that continental commercial law has reached the same result.[46]

In connection with equitable servitudes attention should also be called to *Barker* v. *Stickney*,[47] involving the question of restrictions upon chattels, which was fully discussed in a prior issue of this REVIEW.[48]

10. CONVERSION

An old question came up in a new form in *Re Boshart's Estate*.[49] There vendor in North Dakota contracted to sell lands in New

[45] To the same effect, Didlake *v.* Roden Grocery Co., 160 Ala. 484, 49 So. 384 (1909); Fairfield *v.* Lowry, 207 Mass. 352, 93 N. E. 598 (1911); Gompers *v.* Rochester, 56 Pa. St. 194 (1867); Public Opinion Pub. Co. *v.* Ransom, 34 S. D. 381, 148 N. W. 838 (1914); Palmer *v.* Toms, 96 Wis. 367, 71 N. W. 654 (1897); Parnell *v.* Dean, 31 Ont. 517 (1899).

[46] "The obligation of the first seller has an intimate relation to the business; it contributes to augment its value. One would naturally suppose that in reselling it the first buyer intended to guarantee the sub-purchaser against the acts of the first seller and to assign to the sub-purchaser his right to proceed against the vendor." 3 LYON CAEN ET RENAULT, TRAITÉ DE DROIT COMMERCIEL, 4 ed., § 249 *ter*.

[47] [1918] 2 K. B. 356. [48] 32 HARV. L. REV. 278.

[49] 107 Misc. 697, 177 N. Y. Supp. 567 (1919), aff'd 188 App. Div. 788, 177 N. Y. Supp. 574 (1919).

York to a purchaser, the latter to take possession and pay in installments and conveyance to be made when all was paid. At vendor's death, purchaser was in default. The question was whether the land was subject to a "transfer tax" in New York as being "tangible property" left by the deceased vendor. Both courts held rightly that it was not; that the deceased left a claim against purchaser for the purchase money which was "intangible property." Although purchaser was in default, vendor could have made him take and the chose in action upon the contract went to his representative, who could assert that the legal title was held as security therefor. Moreover, although time was expressly made of the essence, the contract provided only for termination at the option of vendor in case of default and this option had not been exercised at the time of his death. As this condition subsequent had not operated to terminate the vendor-purchaser relation, in any view a court of equity must have held that vendor left a chose in action, not land, and that the tax did not attach thereto.

In *Miedema* v. *Wormhoudt* [50] a contract by purchaser to sell to a third person, while purchaser's contract with vendor was still executory, was treated as a conveyance of purchaser's equitable ownership, the same as an assignment. In that view, in such a case as *Bird* v. *Hall*,[51] it would have made no difference whether purchaser in the original contract assigned his contract to the second purchaser or made a new contract with the latter to sell him the land. This ought to be the law. Such a view is also significant for cases where *cestui que trust* declares himself trustee for a second *cestui* and thereafter assigns to another.[52] If second *cestui* became equitable owner, there was no interest to give to the assignee and, as the right of first *cestui* was equitable only, assignee got no legal power. On the other hand, we are told in *Bishop* v. *Barndt* [53] that purchaser by contracting to convey to a third person could not "create a privity of contract" between subpurchaser and vendor, and that without an assignment subpurchaser could not

[50] 288 Ill. 537, 123 N. E. 596 (1919).

[51] 30 Mich. 374 (1874).

[52] See Phillips *v.* Phillips, 4 De G. F. & J. 208 (1861); Cave *v.* Mackenzie, 46 L. J. Ch. 564 (1877); Cave *v.* Cave, 15 Ch. D. 639 (1880); Hill *v.* Peters [1918] 2 Ch. 273. But compare Dean Ames's view, "Purchase for Value without Notice," 1 HARV. L. REV. 1, 8–12.

[53] 29 Cal. App. Dec. 747, 184 Pac. 901 (1919).

object to a decree of strict foreclosure as entailing a forfeiture. In that case time was expressly made of the essence and under the decisions in California timely performance was a condition precedent.[54] Hence, there was no equitable ownership to convey to subpurchaser.

Conversion by condemnation proceedings was involved in *New York R. Co.* v. *Cottle.*[55] Land was in course of condemnation for a railroad. The owner died after accepting the report of the commissioners and confirmation of the report on his motion. Afterwards the damages awarded were claimed by creditors on the one hand and by the state on the other hand as having succeeded to the legal title of which the landowner had not been actually divested at the time of his death. The court held properly that after confirmation of the report the landowner had only a claim against the railroad company for money, that the latter was then equitable owner of the land and that the money should go to the creditors.

A group of recent cases present different aspects of the effect of conditions precedent to the vendor-purchaser relation. In *Pickens* v. *Campbell*[56] the purchase money was to be paid in installments and, in accordance with prior decisions in that jurisdiction, time was of the essence, although no words of that import were expressly used. Accordingly the court held payment of each installment at the time fixed a condition precedent, so that there was no vendor-purchaser relation at vendor's death when installments remained unpaid and hence the contract was not part of the vendor's personal estate. Assuming that there was really a condition precedent and not a condition subsequent working a forfeiture,[57] the case would be similar to an option contract and the result would be right. In *Vigars* v. *Hewins*[58] purchaser in an option contract borrowed of assignee the money with which to exercise the option by making the required payment and (1) delivered the written contract to assignee, (2) agreed with assignee to execute a written assignment to him. Three months later purchaser executed a written assignment accordingly, but in the meantime a creditor had obtained a judgment against purchaser which by statute was a lien

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[54] Glock *v.* Howard & Wilson Co., 123 Cal. 1, 55 Pac. 713 (1898).

[55] 187 App. Div. 131, 175 N. Y. Supp. 178 (1919).

[56] 104 Kan. 425, 179 Pac. 343 (1919).

[57] The position of the Kansas courts on this point will be considered later.

[58] 169 N. W. (Ia.) 119 (1918).

on his equitable interest in lands. The court held rightly that the unexercised option did not give rise to any equitable ownership upon which the judgment would be a lien;[59] that delivery of the instrument created no equitable lien upon the contract nor upon the equitable interest in the land acquired by exercise of the option, but that the agreement to execute a written assignment did create such a lien because the agreement was specifically enforceable in equity. Delivery of the written contract would not create such a lien, at least as against third persons, because possession of the instrument would not control assertion of the contract in court or exercise of the option. The contract could be proved by any note or memorandum signed by the vendor. Hence the case is not like those where a policy of life insurance or a savings bank book or, perhaps, a letter of credit[60] is delivered to the creditor or assignee, but is rather like those in which, in American jurisdictions where recording acts prevail, title deeds are so delivered.[61] Possession of the paper did not give a practical control over the claim. But the contract to assign, specifically enforceable against purchaser, created an equitable lien when the option was exercised, just as a contract to procure title to Blackacre and convey to purchaser will make the purchaser equitable owner when title to Blackacre is procured.[62] Such cases might also be put on the ground of constructive trust. If, after exercise of the option, purchaser were to keep both the equitable estate and the money paid him to enable

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[59] There are *dicta* that the holder of an unexercised option is equitable owner — that there is a conversion subject to reconversion if the option is not exercised. Keep *v.* Miller, 42 N. J. Eq. 100, 107, 6 Atl. 495 (1886); House *v.* Jackson, 24 Ore. 89, 99, 32 Pac. 1027 (1893); Kerr *v.* Day, 14 Pa. St. 112, 114 (1850); McKay *v.* Carrington, 1 McLean (U. S.) 50, 54 (1829). If this were so, an option contract would create a present equitable ownership and hence an indefinite option could not be held to infringe the rule against perpetuities. But it cannot be so. "It is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified." Kindersley, V. C., in Ranelagh *v.* Melton, 2 Drew. & Sm. 278, 281–282 (1864). The *dicta* first cited all rest mediately or immediately on Lawes *v.* Bennett, 1 Cox Ch. 167 (1785), which is now held not to mean that the option contract works a conversion at once. *In re* Marlay, [1915] 2 Ch. 264.

[60] See Hershey, "Letters of Credit," 32 HARV. L. REV. 1, 29–30.

[61] 3 POMEROY, EQUITY JURISPRUDENCE, § 1265.

[62] Rutland *v.* Brister, 53 Miss. 683, 686 (1878).

him to exercise it and in consideration of his agreement to assign, he would be enriched unjustly at the expense of the assignee. Hence equity may well treat him as constructive trustee of the estate.[63] In either event the right of assignee attached to the equitable estate at its very inception, while the statutory judgment lien could only take effect upon it after it had come into existence burdened with the equity or as assignee's property.[64]

Another form of the same question is presented by cases as to the risk of loss. In *Amundson* v. *Severson* [65] the contract was made in October, 1909. Purchaser went into possession in March, 1910. Payments were made in March, 1911. Most of the land was washed away by the Missouri River in 1913. Thereafter vendor procured a good title. As a condition precedent to the vendor-purchaser relation had not been fulfilled at the date of the loss [66] and purchaser could not have been compelled to take as things then stood, the risk was on vendor, although purchaser was in possession, and the court so held. This is a good case to bring out that possession is not a material consideration in determining upon whom the risk of loss rests in a court of equity. The converse situation arose in *Maudru* v. *Humphreys* [67] where, all conditions precedent having been fulfilled, upon review of the authorities the risk of loss by fire was held to be upon purchaser although not in possession.[68] Pur-

[63] It is submitted that this is the reason of the doctrine discussed in 3 POMEROY, EQUITY JURISPRUDENCE, § 1288.

[64] Compare Eyre *v.* Burmester, 10 H. L. Cas. 90 (1862).

[65] 170 N. W. (S. D.) 633 (1919).

[66] Green *v.* Smith, 1 Atk. 572 (1738); Broome *v.* Monck, 10 Ves. 597, 612–613 (1805); Savage *v.* Carroll, 1 Ball & B. 265, 281 (1810); Newton *v.* Newton, 11 R. I. 390, 394 (1876).

[67] 98 S. E. (W. Va.) 259 (1919).

[68] Possession at the time of the loss as a criterion is argued by Professor Williston, "The Risk of Loss After an Executory Contract of Sale in the Common Law," 9 HARV. L. REV. 106. There is practically no authority for this view. A *dictum* in Good *v.* Jarrard, 93 S. C. 229, 76 S. E. 698 (1912) (contract not enforceable in equity) and an overruled decision of an inferior court in New York, Wicks *v.* Bowman, 5 Daly, 225 (1874) are most in point. It is suggested by and argued on the analogy of the law as to sales of chattels. But three important distinctions have to be noted. (1) A contract for the sale of a chattel gives rise to no real right; such a right arises only upon transfer of the legal title. In equity, on the other hand, a contract for the sale of lands gives rise to a real right from the time when the contract is in the class of specifically enforceable undertakings. Indeed to-day, when in most jurisdictions the purchaser can record his contract and thus charge every one with constructive notice of his rights, he is often better protected in his equitable ownership than *cestui que trust*. (2) In case of a chattel, it is expedient to cast the risk of loss on the one in

chaser was in possession in *Linn County Bank* v. *Grisham*.[69] The court held that risk of loss by fire was upon the purchaser because the contract was "lawful and binding" at the time of the fire and hence the building was purchaser's property when burned. In *Neponsit Realty Co.* v. *Judge*,[70] after the contract a large part of the land was washed away. Following the settled rule in New York,[71] the court held purchaser liable in a suit for specific performance.[72]

possession because that puts pressure on him to care for it. In case of a building, the one in possession exercises his possession through having his property in the building, and the presence of his property therein is enough to induce him to care for the risk of fire even if the building is at another's risk. (3) Possession is not material with respect to the passing or existence of either legal or equitable title to land. Why, then, should it be material as to the incidents of equitable title?

[69] 185 Pac. (Kan.) 54 (1919).

[70] 106 Misc. 445, 176 N. Y. Supp. 133 (1919).

[71] Sewell *v.* Underhill, 197 N. Y. 168, 172, 90 N. E. 430 (1910).

[72] Considering how much has been made of the matter since Langdell (BRIEF SURVEY OF EQUITY JURISDICTION, 60 *ff*), there is really very little authority against the doctrine of equity as to risk of loss. Of the cases that have been cited as *contra*, two, Thompson *v.* Gould, 20 Pick. (Mass.) 134 (1838), and Gould *v.* Murch, 70 Me. 288 (1879), were oral contracts unenforceable because of the Statute of Frauds, and the actions were at law; in two more, Phinizy *v.* Guernsey, 111 Ga. 346, 36 S. E. 796 (1900) (containing, by the way, a *dictum* in favor of the equity doctrine), and Good *v.* Jarrard, 93 S. C. 229, 76 S. E. 698 (1912), the vendor-purchaser relation had not attached at the time of the loss because conditions precedent remained unfulfilled; in two more, Wells *v.* Calnan, 107 Mass. 514 (1871), Powell *v.* Dayton Co., 12 Ore. 488, 8 Pac. 544 (1885), 14 Ore. 356, 12 Pac. 665 (1887), 16 Ore. 33, 16 Pac. 863 (1888), the action was brought at law by the vendor. In none of these cases was the equitable doctrine as to risk of loss in any wise involved. In the first four, purchaser could not have been compelled to take regardless of the loss. In the last two, when vendor sued at law for a breach he could not claim that purchaser was equitable owner. For the rest, Cutcliff *v.* McAnally, 88 Ala. 507, 512, 7 So. 331 (1889), is not even a strong *dictum;* Davidson *v.* Insurance Co., 71 Ia. 532, 534, 32 N. W. 514 (1887), was a question of construction of an insurance policy; Kares *v.* Covell, 180 Mass. 206, 62 N. E. 244 (1902), and Bautz *v.* Kuhworth, 1 Mont. 133, 136 (1869), were actions at law, and in Bautz *v.* Kuhworth plaintiff did not even show a breach at law on the part of vendor. The one case thoroughly in point on this side is Wilson *v.* Clark, 60 N. H. 352 (1880), a suit in equity by purchaser. But this case relies on Thompson *v.* Gould without any discussion and without noting that the contract there was unenforceable in equity and did not raise the question which it is assumed was decided. In Kares *v.* Covell, 180 Mass. 206, 62 N. E. 244 (1902), after a bond for a deed an incumbrance was imposed by operation of law. The court decided the case as one of construction of a covenant to "convey free of incumbrances," holding it to mean free of incumbrances at the time of conveyance. It says expressly that the cases as to equitable ownership are inapplicable to such a contract. Compare Sanborn, J., in Nixon *v.* Marr, 190 Fed. 913, 921 (1911), and cases there cited, showing that the same result would be reached under such a covenant by courts which adopt the doctrine of equitable ownership. Although the language of the Massachusetts cases is against the

Difficulty of arranging insurance has been one of the objections urged against the doctrine of equity as to risk of loss.[73] *Carnation Lumber Co.* v. *Tolt Land Co.*[74] gives the answer. There the policies were payable to vendor, purchaser, and mortgagee of vendor, according to their interests. It was held that assignee of purchaser, on paying the purchase money after loss, was entitled to the insurance. In other words, the matter of insurance is to be arranged exactly as is done habitually between mortgagor and mortgagee.[75]

An interesting case, somewhat like *Rayner* v. *Preston*,[76] is *Doty* v. *Rensselaer Fire Insurance Co.*[77] By oral agreement between husband and wife, who were living apart, the husband was to provide her a home by giving her the use of certain land and the buildings thereon and was to keep the house thereon in repair and insured for her benefit. The wife went into possession and made improvements, so that the contract was enforceable in equity. After twelve years the house burned and the husband, having collected the insurance, refused to repair or to provide another home. The wife then sued the husband and the insurance company which had paid him the amount of the loss with knowledge of her claims. The lower court held there was no cause of action. The Appellate Division reversed the order, holding that the oral contract coupled with possession and improvements made the wife an equitable tenant for life, and that:

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prevailing doctrine, something more decisive than Kares *v.* Covell or the statement in Thompson *v.* Gould that where the contract was not enforceable in equity the court at law could not recognize the doctrine of equitable ownership, is required to commit the court to rejection of a long-settled theory of courts of equity or of a consequence thereof sustained by the overwhelming weight of Anglo-American authority. It should be remembered, moreover, that Thompson *v.* Gould was decided in 1838, and that because of the narrowly limited equity jurisdiction in that state and the tardy course of legislation with respect thereto and consequent judicial caution in applying equitable doctrines, the older decisions in Massachusetts are "exceedingly misleading as authorities upon the powers and doctrines of equity in other states." 1 POMEROY, EQUITY JURISPRUDENCE, § 312.

[73] Williston, "The Risk of Loss After an Executory Contract of Sale in the Common Law," 9 HARV. L. REV. 106, 122.

[74] 103 Wash. 633, 175 Pac. 331 (1918).

[75] See RICHARDS, INSURANCE, 3 ed., 394.

[76] 18 Ch. D. 1 (1881).

[77] 188 App. Div. 29, 176 N. Y. Supp. 55 (1919), reversing 171 N. Y. Supp. (Misc.) 852 (1918).

"Whatever interest in the house the plaintiff had, a corresponding interest attaches to the insurance, which is a substitute for the house."

There is no citation or discussion, but the court asserts the proposition as something obvious. It might be supported on the basis of the dissenting opinion in *Rayner* v. *Preston* and the cases in accord or supposed to be in accord therewith. But it is submitted that the majority of the court in *Rayner* v. *Preston* was right.[78] In the New York case, the husband's contract to provide a home by giving the wife use of the land for life and keeping the house repaired and insured for her benefit was specifically enforceable. *Pace* the pronouncement of the Court of Appeals in *Beck* v. *Allison*,[79] she ought to be able to compel him to keep the house repaired and to rebuild it if it burned down; and if he contracted to keep it in-

[78] In Rayner *v.* Preston there was a contract for the sale of land with buildings. The buildings were insured in favor of vendor before the contract. They were injured by fire before the time for conveyance and vendor collected the insurance. Purchaser sued to get the insurance money as being held in trust for him or in the alternative to compel vendor to use the money to restore the building. The bill was dismissed, James, L. J., dissenting on the ground that the insurance money was an altered form of the *res* of which purchaser was equitable owner. This cannot be so. Insurance is a contract of indemnity. It was not the buildings that were insured, but the interest of the vendor in the buildings. Vendor has a beneficial interest to protect, the same as a mortgagee, whereas trustee has no such interest and can only act for *cestui que trust.* Of the cases that are supposed to be in accord with the dissenting opinion in Rayner *v.* Preston, the most part were decided under old forms of policy and involve only the question who was insured. *E.g.*, Gate *v.* Smith, 4 Edw. Ch. (N. Y.) 702 (1846); Insurance Co. *v.* Graybill, 74 Pa. St. 17 (1873). Others are the merest *dicta*, *e.g.*, Phinizy *v.* Guernsey, 111 Ga. 346, 36 S. E. 796 (1900), where the loss fell on vendor because title was imperfect at the date of the loss and vendor was insured; Insurance Co. *v.* Updegraff, 21 Pa. St. 513 (1853), where vendor was held to have an insurable interest in his security although purchaser was equitable owner; Reed *v.* Lukens, 44 Pa. St. 200 (1863), where the policy had been assigned to purchaser. In Skinner *v.* Houghton, 92 Md. 68, 48 Atl. 85 (1900), which is more in point, the facts were similar to those in Rayner *v.* Preston except that some of the insurance companies had not paid and purchaser sued both vendor and the insurers. Some of the insurers refused to pay because vendor had represented he was owner and were released. Some offered to pay whoever was entitled. As to these, vendor was held trustee. Here the companies consented to the transfer, so that it was as if vendor and purchaser were insured as their interests might appear and hence vendor must account to the purchaser for the surplus after his claim for balance of the purchase money was satisfied.

Phoenix Assurance Co. *v.* Spooner, [1905] 2 K. B. 753, and Kortlander *v.* Elston, (C. C. A.) 52 Fed. 180 (1892), are in accord with the majority of the court in Rayner *v.* Preston.

[79] 56 N. Y. 366 (1874). It is significant that New York courts are driven to get around Beck *v.* Allison by such doubtful arguments as that in the present case.

sured, she ought to be able to compel him to use the insurance money in rebuilding. That is what in substance he agreed to do, and the legal remedy of damages for breach of the contract is not available because of the Statute of Frauds and would not get her what she is entitled to. But what claim has she against the insurance company? Unless the insurance money can be called an altered form of a *res* which she owned in equity, there would seem to be none.

In *Lewis* v. *Hall* [80] purchaser not in possession and in default gave a mortgage on crops growing on the land. He made no effort to perform and did not call for possession. It was held rightly that the mortgage did not convey anything. Because of his default he could not have held the vendor at the time when he made the mortgage and was not equitable owner unless vendor elected to treat him as such. Likewise vendor in default cannot claim that purchaser is his debtor in equity. In *Lowther-Kaufman Oil Co.* v. *Gunnell* [81] purchaser was not in possession. Third persons claimed the land and it became necessary for vendor to sue them in order to remove the cloud on his title. Purchaser refused to complete by paying the purchase money till this had been done. It was held that he was not chargeable with interest until after the decree removing the cloud had been affirmed by the highest court of the state and the title had thus become marketable.

Text writers in cases of this sort as well as in cases of risk of loss are wont to say that when the contract is in the class of those which equity will specifically enforce, vendor is "trustee of the legal title" and purchaser is "trustee of the purchase money," or that vendor is "equitable owner of the purchase money." [82] This unhappy mode of speech appears to begin with Lord Hardwicke in *Pollexfen* v. *Moore*.[83] It has often been repeated in judicial opinions,[84] and

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[80] 27 Cal. App. 422, 176 Pac. 171 (1918).

[81] 184 Ky. 587, 212 S. W. 593 (1919).

[82] 1 STORY, EQUITY JURISPRUDENCE, § 790; 1 POMEROY, EQUITY JURISPRUDENCE, § 105.

[83] 3 Atk. 272, 273 (1745). The earlier case of Davie *v.* Beardsham, 1 Cas. Ch. 38, 39, says no more than that vendor "stood trusted" for the purchaser.

[84] Estate of Dwyer, 159 Cal. 664, 675, 115 Pac. 235 (1911); Rhodes *v.* Meredith, 260 Ill. 138, 143, 102 N. E. 1063 (1913); Williams *v.* Haddock, 145 N. Y. 144, 150, 39 N. E. 825 (1895); Champion *v.* Brown, 6 Johns. Ch. (N. Y.), 398, 403 (1822).

is to be seen in several decisions during the past year.[85] The objections to this mode of stating the equitable doctrine are clear enough. Vendor is much more like a mortgagee than like a trustee and purchaser cannot be called trustee of anything in any proper use of the term "trust." What we may say is that a court of equity regards purchaser as owner, and vendor as creditor for the purchase money, holding the legal title for his security. Some courts have put it in this way.[86] The prevailing mode of expression arose from the analogy of a covenant in a settlement to lay out certain trust moneys in land. In such case the moneys were treated as already land. Story, in discussing the effect of a contract for the sale of land,[87] cites Fonblanque,[88] and the latter is speaking not of vendor and purchaser but of covenants in a settlement.

When we speak of conversion we are not describing a condition of the property for all purposes with respect to everybody but are giving a name to a situation resulting from the application of equitable doctrines to a state of facts between certain parties. This is well illustrated by a recent litigation extending over two states.

In *Re Loyd's Estate* [89] and *Norris* v. *Loyd*,[90] a testator domiciled in California had property in California and lands in Iowa. He directed his executors to sell the Iowa lands and divide the proceeds among his twelve children. In a litigation in California, to which the widow and the twelve children were parties, one H had established that he was a duly acknowledged illegitimate child of the testator, and that as such, under the law of California, although not mentioned in the will, he was entitled to take two thirty-ninths of the whole estate "wherever situated." Under the laws of Iowa, on the other hand, there being a valid will, H was excluded by the gift to the twelve legitimate children. The widow and legitimate children agreed to hold the Iowa land as land and so notified the

[85] New York R. Co. *v.* Cottle, 187 App. Div. 131, 175 N. Y. Supp. 178 (1919); Neponsit Realty Co. *v.* Judge, 106 Misc. 445, 176 N. Y. Supp. 133 (1919); Johnson *v.* Merritt, 99 S. E. (Va.) 785, 788 (1919) (a contest as to priority of a statutory judgment lien); Maudru *v.* Humphreys, 98 S. E. (W. Va.) 259 (1919).

[86] Longwell *v.* Bentley, 23 Pa. St. 99, 102 (1854); Bender *v.* Luckenbach, 162 Pa. St. 18, 22, 29 Atl. 295 (1894).

[87] 1 STORY, EQUITY JURISPRUDENCE, § 790.

[88] EQUITY, Book 1, chap. 6, § 9.

[89] 175 Cal. 699, 167 Pac. 157 (1917).

[90] 183 Ia. 1056, 168 N. W. 557 (1918).

executors, who then refused to sell. In California the Superior Court ordered the executors to sell the land and removed them for disobedience of the order. These orders were reversed by the Supreme Court. In Iowa, H intervened in a partition suit between the twelve legitimate children and the widow. It was held that he had no claim. His proposition was that the provision for sale and division of the proceeds made the Iowa land personalty for all purposes and as to everybody and as such brought it within the operation of California law, and that no reconversion could be made thereafter by agreement of the widow and the devisees in prejudice of his rights unless he was a party thereto. This contention was properly rejected by both courts. As between the devisees, as between them and the widow, as between their heirs and their executors, if one of them had died after testator's death, and as between them and persons claiming against or under them thereafter, the land was to be held personalty and any one who acquired an interest on this basis would have been a necessary party to any reconversion. But H did not claim under them, nor had he acquired any interest or any claim against them after testator's death. His claim was prior to, not under or depending on, the will, and by the law of Iowa, where the land lay, the will operated to cut it off.

Another illustration that conversion is a name given to results reached on other grounds, not a fact from which we may reason for all purposes and with respect to the rights of all parties, is afforded by *Kneisley* v. *Kneisley*.[91] Testator directed all his estate, both real and personal, to be sold, one third of the proceeds to be paid to his wife and the rest to certain named beneficiaries. The widow elected not to take under the will. It was held that the crops on the land between testator's death and the sale of the lands that remained to be sold under the will went to the heirs, who took the freehold beneficially pending the sale. As between those claiming under or through the beneficiaries, the whole blended fund was personalty. But the beneficiaries were only to take the proceeds after sale. Down to the sale they had no interest in the lands. Their claim was against the executors who were given a power to sell the land. Accordingly no one was in a position to claim against the heirs who took the legal title subject to having it divested by

[91] 107 Atl. (Md.) 195 (1919).

the executors exercising their power of sale and dividing the proceeds among the beneficiaries. There is an analogous situation where vendor marries after the contract to sell land, breaks the contract in some material respect, and dies. If purchaser then elects to sue at law for the breach, vendor's widow will have dower.[92] If in such a case we talk about conversion and reconversion, we may well find difficulty in determining whether reconversion should date from the making of the contract or from the breach or from the election to sue for damages. But if we ask, as between vendor's widow, his heir and his executor, what he left, we see that he left legal title to the land, subject to the power of purchaser to assert legal ownership if he chose, but he left no chose in action against purchaser to go to his executor, since at his death he could not sue purchaser and the latter was not in equity debtor for the purchase money. The widow acquired dower at law and there was no one in a position to make her hold it in equity for his benefit.

Foreclosure by the vendor was involved in *Hawkins* v. *Rodgers*.[93] In that case, purchaser had made improvements. It was held that he could have strict foreclosure only on condition of paying for the improvements. Otherwise the foreclosure must be by sale. The Supreme Court of Wisconsin has held that strict foreclosure is the only proper decree.[94] This holding is based on the palpably fallacious argument that "the title did not pass by the contract, but remained in the vendor;" as if the title to mortgaged land were not

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[92] See Day *v.* Solomon, 40 Ga. 32 (1869). Compare the situation in Hopkinson *v.* Dumas, 42 N. H. 296 (1861).

[93] 91 Ore. 483, 179 Pac. 563 (1919).

[94] Button *v.* Schroyer, 5 Wis. 598 (1856); Nelson *v.* Jacobs, 99 Wis. 547, 555, 75 N. W. 406 (1898), citing many decisions of that court to the same effect. See also Todd *v.* Simonton, 1 Colo. 54 (1867). The great weight of authority in the United States is *contra:* Haley *v.* Bennett, 5 Port. (Ala.) 452 (1837), and later cases in Alabama; Lewis *v.* Boskins, 27 Ark. 61 (1871), and later cases in that state; Sparks *v.* Hess, 15 Cal. 186 (1860); Pleasants *v.* Fay, 13 App. D. C. 237 (1898); Andrews *v.* Sullivan, 7 Ill. 327 (1845), and later cases in Illinois; Lagow *v.* Badollet, 1 Blackf. (Ind.) 416 (1826), and later cases in Indiana; Abbott *v.* Moldestad, 74 Minn. 293, 77 N. W. 227 (1898); Walker *v.* Casgrain, 101 Mich. 604, 60 N. W. 291 (1894), and later cases in Michigan; Gaston *v.* White, 46 Mo. 486 (1870), and later cases in Missouri; Gardels *v.* Kloke, 36 Neb. 493, 54 N. W. 834 (1893); Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398 (1822); Clark *v.* Hall, 7 Paige (N. Y.), 382 (1839); Vance *v.* Blakely, 62 Ore. 326, 123 Pac. 390 (1912); Whitmire *v.* Boyd, 53 S. C. 315, 349, 31 S. E. 306 (1898); Brace *v.* Doble, 3 S. D. 110, 52 N. W. 586 (1892); Wade *v.* Greenwood, 2 Rob. (Va.) 474 (1843), and later cases in that state.

in the mortgagee,[95] and as if in each case vendor or mortgagee, being parties to the suit, could not be compelled to convey to the purchaser at the sale under the decree of foreclosure by sale. Strict foreclosure should only be permitted where no substantial payment has been made,[96] or where the present value of the land is less than the amount due vendor,[97] or where, as in the present case, purchaser having made improvements under the contract, vendor elects to pay for them.[98]

II. Consideration

If equity gives an extraordinary complementary remedy upon contracts where the legal remedy is inadequate to secure the legal right, we should expect a court of equity to limit its inquiry to the adequacy of the common-law remedy, the advisability of exercise of the chancellor's jurisdiction, if he finds he has jurisdiction, and the most just and effective mode of applying equitable remedies under the circumstances. Yet equity has not stopped there but has established a doctrine that the chancellor will not aid a volunteer although he claims under a sealed instrument, enforceable at

[95] The court was perhaps influenced by the statute in Wisconsin whereby mortgagor has the legal title and mortgagee a lien only (1 Pomeroy, Equity Jurisprudence, § 163, note 1) and overlooked the common-law situation to which equity applied foreclosure by sale.

[96] Strict foreclosure was held improper where part payment had been made, in Andrews *v.* Sullivan, 7 Ill. 327 (1845) ($400 paid out of $990); Vail *v.* Drexel, 9 Ill. App. 439 (1881); Fitzhugh *v.* Maxwell, 34 Mich. 138 (1876) (one-fourth paid); Bank *v.* Thornburg, 54 Neb. 782, 75 N. W. 45 (1898) (ten per cent paid). It was held proper where no payment had been made, in Morgan *v.* Dalrymple, 59 N. J. Eq. 22, 46 Atl. 664 (1899); State *v.* Sheridan, Clark Ch. (N. Y.) 533 (1841). It was allowed in Fairchild *v.* Mullan, 90 Cal. 190, 27 Pac. 201 (1891) (one-fourth paid but form of decree not objected to); Southern R. Co. *v.* Allen, 112 Cal. 255, 44 Pac. 796 (1896) (one-fifth paid, but court divided); Denton *v.* Scully, 26 Minn. 325, 4 N. W. 41 (1879) ($2,000 paid out of $5,800, but decided on demurrer to bill for strict foreclosure and general relief, and the court said the decree should direct a sale if that were more equitable). In Bank *v.* Brander, 124 Cal. 255, 56 Pac. 1109 (1899), $3,500 had been paid out of $50,000. Here a strict foreclosure probably did not operate inequitably under the circumstances. The Supreme Court of Oregon holds that foreclosure by sale is the rule and "strict foreclosure the exception." Flanagan *v.* Land Co., 45 Ore. 335, 77 Pac. 485 (1904); Vance *v.* Blakely, 62 Ore. 326, 123 Pac. 390 (1912). It allowed strict foreclosure in Trust Co. *v.* Mackenzie, 33 Ore. 209, 52 Pac. 1046 (1898), and Vance *v.* Blakely, *supra*, where on consideration of all the circumstances it appeared more equitable.

[97] Vance *v.* Blakely, *supra*.

[98] Lytle *v.* Scottish American Mortgage Co., 122 Ga. 458, 50 S. E. 402 (1905).

law, and has a legal right.[99] I discussed this subject in another place recently,[100] where I attempted to show that there were at least six cases where the proposition that equity would not aid a volunteer did not apply or was not wholly true, and suggested a tendency to get away from the doctrine and to enforce deliberate promises simply as promises under one pretext or another. A recent decision affords a striking illustration of this tendency. In *McCrilles* v. *Sutton*[101] husband and wife in 1894 executed an instrument under seal, to which M was a party, in which they recited that M had been given them to adopt when a child, that they had mistakenly assumed that he had been adopted by them, that they had always promised him that on the death of the husband he should have the same amount of property as their own son, and that he had served them faithfully, and promised "in consideration of love and affection and of the foregoing premises," of the promises theretofore made to M and "of the services performed . . . set forth in said premises," that he should have the same share in the property of the husband and wife that he would have had if he had been lawfully adopted. In 1901 the husband conveyed all his property to the wife, reserving a life estate. The wife died intestate in 1917. Thereupon M brought a bill for specific performance against the heirs of the wife and a decree in his favor was affirmed. It could not be claimed here that there was the "consideration" of blood relationship or of "natural love and affection." Moreover that doctrine has been confined in equity to the one case of covenants to stand seized to another's use. Nor is this a case of defective conveyance to a child by way of advancement

[99] Jefferys *v.* Jefferys, Cr. & P. 138 (1841), and subsequent cases in England. In many of the American cases cited for this doctrine there was no contract at law. There was a valid instrument at law in Barrett *v.* Geisinger, 179 Ill. 240, 249, 53 N. E. 576 (1899); Black *v.* Cord, 2 Har. & G. (Md.) 100 (1827); Selby *v.* Case, 87 Md. 459, 39 Atl. 1041 (1898); Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514 (1882); Vasser *v.* Vasser, 23 Miss. 378, 382 (1852); Bosley *v.* Bosley, 85 Mo. App. 424 (1900); Burton *v.* Le Roy, 5 Sawy. (U. S.) 510 (1879). But most of these cases went off on other grounds. In Graybill *v.* Brugh, 89 Va. 895 (1893), the court denied specific performance of an option under seal because there was no consideration. In a later case, however, the same court treated such an option as an irrevocable offer. Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33 (1906). Also Lamprey *v.* Lamprey, *supra*, should be compared with McMillan *v.* Ames, 33 Minn. 257, 22 N. W. 612 (1885).

[100] "Consideration in Equity," 13 ILLINOIS L. REV. 667.

[101] 173 N. W. (Mich.) 333 (1919).

where equity gives reformation under circumstances amounting to specific performance. But the case is not unlike those in which, the promisor being dead, the question was between those to whom the ancestor had promised to give and his heirs who took as a windfall what had been promised to another.[102] Here plaintiff was neither a child nor a creditor. Yet he was something very like both and there might be said to be a "meritorious consideration" in equity.[103] It differs from the cases of the latter type in that there was no attempt made to convey. The court is squarely and avowedly enforcing specific performance of an executory promise. If the contract is valid and enforceable at law it is an unjustifiable anomaly to require something more as a requisite of the only effective remedy which the legal system affords.

Another case in which, under one pretext or another, courts of equity specifically enforce a promise under seal without consideration is illustrated by *Thomason* v. *Bescher*.[104] Here there was a formal covenant to convey certain lands, on condition of payment (at the holder's option) of a specified sum within a time fixed. The court, following the all but unanimous current of authority,[105] decreed specific performance. There can be no quarrel with so desirable a result. But the reasoning is suggestive. The court begins by reminding us that a covenant under seal requires no consideration. It must needs qualify this, however, by admitting that equity requires a consideration before it will enforce an executory contract, even though it be under seal. Accordingly it cites the cases in which such instruments are treated as irrevocable offers, and suggests that in cases where equity has called for a consideration as a prerequisite of enforcing an option under seal "the mind of the judges was

[102] Wright *v.* Goff, 22 Beav. 207 (1856); Mason *v.* Moulden, 58 Ind. 1 (1877); Cummings *v.* Freer, 26 Mich. 128 (1872); Huss *v.* Morris, 63 Pa. St. 367 (1869); Brock *v.* Odell, 44 S. C. 22, 21 S. E. 976 (1894).

[103] Thompson *v.* Attfeild, 1 Vern. 40 (1682); Colman *v.* Sarel, 3 Bro. Ch. 12 (1789); Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112 (1886). The sound view is that a "meritorious consideration" of itself will not support an executory promise. Landon *v.* Hutton, 50 N. J. Eq. 500, 25 Atl. 953 (1892); Matter of James, 146 N. Y. 78, 40 N. E. 876 (1895). *Contra*, Crawford's Appeal, 61 Pa. St. 52 (1869). See also *Re* Hoffman's Estate, 177 N. Y. Supp. (Misc.) 905 (1919).

[104] 176 N. C. 622, 97 S. E. 654 (1918).

[105] Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 564 (1869); Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580 (1898); O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602 (1896); McMillan *v.* Ames, 33 Minn. 257, 22 N. W. 612 (1885); Watkins *v* Robertsor, 105 Va. 269, 54 S. E. 33 (1906).

not specially called to the distinctions existent and usually observable between a mere offer to sell without consideration and without seal and one that is effective as a binding agreement by reason of the seal." [106] Whether we speak of an irrevocable offer [107] or of a power,[108] there is a covenant enforceable at law, and no obstacle and no just objection to enforcement in equity beyond a doctrine devised for executory or defectively executed gifts, which has no legitimate application to business transactions. The holder of an option under seal is to be something more than a mere recipient of the promisor's bounty.[109] And yet the option in and of itself is valuable, and for that the holder of the option under seal gives nothing. After all, we cannot blink the fact that in these cases the chancellor does enforce an executory promise on no other basis than declared intention plus a seal. It is an undesirable anomaly that a valid contract at law, free from all objection on grounds of fraud, coercion, or mistake, and a fair bargain, should be unenforceable in equity.

Where the option is given for a consideration, equity need have no difficulty in following the law. It should be enough if the law has for any reason reached the desirable result that a collateral promise to keep an offer open, made under seal or upon consideration, precludes revocation. It must be enough if there is a common-law consideration. Most of the difficulty which the courts have encountered grows out of the doctrine of mutuality of remedy. In *Starr* v. *Crenshaw* [110] specific performance was granted in such a case.

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[*To be concluded*]

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[106] 176 N. C. 622, 628, 97 S. E. 654, 656 (1918).
[107] 6 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 773.
[108] ANSON, CONTRACTS, Corbin's ed., §§ 32, note 2, 50, note 3.
[109] McMillan *v.* Ames, 33 Minn. 257, 260, 22 N. W. 612 (1885).
[110] 213 S. W. (Mo.) 811 (1919).